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No. 87-1919

In The

Supreme Court of the United States

October Term, 1987

YUKON ENERGY CORPORATION,

Petitioner,

vs.

WILLIAM F. HAGERMAN,

Respondent.

Petition for a Writ of Certiorari to the United States Supreme Court From the Eighth Circuit Court of Appeals

PETITION FOR CERTIORARI

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QUESTION PRESENTED

I. When rendering decisions on summary judgment motions, may lower courts and courts of appeal properly weigh evidence and draw inferences in favor of the plaintiff as moving party where the non-moving defendant has offered evidence of plausible defenses which could support a jury verdict in its favor?

PARTIES TO THE PROCEEDING

Petitioner:

Yukon Energy Corporation

Respondent:

William F. Hagerman

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PETITION FOR CERTIORARI

Petitioner Yukon Energy Corporation prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered and filed in this action on February 9, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit affirming the order of the District Court is reported at 839 F.2d 407 and is reprinted in Appendix A to this Petition. The order of the United States District Court for the District of Minnesota is contained in Civ. No. 4-85-960 (Dist. Minn. October 21, 1986) and is reprinted in Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered and filed on February 9, 1988. A Petition for Rehearing was denied on March 23, 1988. This Petition for Writ of Certiorari is filed within 90 days thereof.

On April 21, 1988 the Court of Appeals stayed the mandate in this case until May 23, 1988 and ordered that if within that time a Petition for Writ of Certiorari has been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based upon diversity of citizenship under 28 U.S.C. § 1332. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

RULE INVOLVED

This case involves Rule 56(c) of the Federal Rules of Civil Procedure. This rule deals with motions for summary judgment and provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The full text of Rule 56 appears in Appendix C to this Petition.

STATEMENT OF THE CASE

This case involves important questions concerning the application of summary judgment standards and a civil defendant's right to a jury trial. The Supreme Court of the United States recently set forth standards for summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). While those cases perhaps encouraged greater use of Rule 56 motions, the Court made clear that the role of the judge in such motions is not to weigh evidence or draw inferences from facts, but rather to ascertain whether there is a genuine issue of fact such that a reasonable jury could return a verdict for the non-moving party. This standard is particularly crucial when summary judgment is sought by a plaintiff and would deny the defendant's right to a jury trial.

In the instant case, the Court of Appeals affirmed the District Court's grant of summary judgment for the plaintiff on both liability and damages. In so doing, the Court of Appeals applied standards that are in direct conflict with the summary judgment standards set forth in *Matsushita, Celotex* and *Anderson.* The court weighed evidence and failed to draw all justifiable inferences in favor of the non-moving party. The consequence is that a money judgment was entered against a defendant even though the defendant had testified to facts constituting complete defenses to the claim and the plaintiff had never refuted those facts under oath.

Plaintiff, Hagerman, sued for specific performance or damages to enforce a stock option contained in an agreement with defendant, Yukon Energy Corporation. In opposition to plaintiff's motion for summary judgment, Yukon Energy Corporation presented evidence that the agreement had been terminated and that plaintiff had himself breached the agreement and was estopped from enforcing the option. The Eighth Circuit disregarded Yukon's evidence by weighing against it evidence of subsequent conduct and by drawing only those inferences from that subsequent conduct which were contradictory of Yukon's direct evidence. Further, the Eighth Circuit even determined damages, again by weighing competing evidence and drawing the most favorable inferences to the plaintiff as to the date of breach and the value of the stock.

The decision of the Eighth Circuit is evidently based upon a misconstruction of *Matsushita, Celotex* and *Anderson.* Each of those cases involved summary judgment against the plaintiff, after opportunity for full discovery, based upon the plaintiff's failure to produce evidence of the plausibility of its claim. The Eighth Circuit failed to recognize the marked differences in the factual context of those cases and appears to have concluded that they authorize a judge to pre-empt the jury's role where the judge believes the facts strongly favor the moving party. This Court should grant certiorari to review how the lower courts have used *Matsushita, Celotex,* and *Anderson;* to clarify whether those cases represent a new view of summary judgment in civil litigation; and to address the standards applicable when summary judgment is sought by the plaintiff, without full discovery, on issues where the plaintiff will bear the ultimate burden of proof.

A. Factual Background

Petitioner Yukon Energy Corporation ("Yukon") is involved primarily in the manufacture and supply of heating products. During March of 1983, David Tjosvold, President and Chairman of Yukon, learned that another company developed an oil condensing furnace which was 95% fuel efficient and that it was willing to sell its new technology for $100,000. During August of 1983, Yukon entered into an agreement with the company which provided Yukon with an option to purchase the new technology. Yukon purchased the technology with general corporate funds.

Hagerman, then a close friend of Tjosvold, was very interested in the potential of the new technology and offered to furnish Yukon with cash to purchase and develop the technology. After Yukon purchased the technology, Hagerman ultimately provided Yukon with $150,000 and Yukon transferred legal title in the technology to Hagerman, who licensed Yukon to use it for ten years. The parties executed a contract which provided that Yukon pay Hagerman royalties of no less than $18,000 per year. The contract provided Yukon with an option to repurchase Hagerman's title in the technology within ten years for $175,000. Finally, the contract provided Hagerman with an option to purchase shares of Yukon equal to 5% of the shares owned by Mr. Tjosvold at book value as determined

by the accounting firm of Peat, Marwick and Mitchell in the event that Yukon carried out a public offering. (The contract is reprinted as Appendix D to this Petition.)

According to the uncontroverted deposition testimony of Mr. Tjosvold, the written contract was only a portion of the agreement between the parties. Prior to execution of the written contract, Hagerman agreed with Tjosvold that the contract could and would be changed in the event it was deemed to be unfair or one sided by Tjosvold in the future. As an inducement for the grant of the stock option, Hagerman also agreed that he would fund a public stock offering of Yukon to the extent of $2,000,000 of a contemplated $5,000,000 underwriting.

According to the uncontroverted deposition testimony of Mr. Tjosvold, Hagerman informed Tjosvold during July and October of 1984 that he wanted to end the contract and get his money back. The written agreement between the parties did not obligate Yukon to return Hagerman's money or to repurchase the technology at that time. Yet, because of Hagerman's repeated demands, Tjosvold on behalf of Yukon agreed to termination of the agreement. On October 23, Tjosvold provided Hagerman with checks for $175,000 and $18,000 and told Hagerman that he understood that this ended the agreement. As of that time Hagerman had not provided funding for any part of the public offering and he did not do so thereafter.

Upon receipt of the checks, Hagerman negotiated the checks at Yukon's bank, receiving cash. Hagerman then immediately sent a letter to Yukon giving notice of his intent to exercise the stock option.

Yukon subsequently had a reduced public stock offering for $2,500,000. In conjunction with that offering, Yukon filed registration statements with the Securities and Exchange Commission and the Minnesota Department of Commerce. The prospectus described the written agreement between Yukon and Hagerman and described Hagerman's stock option without qualification as to Yukon's defenses. It stated, in part:

> In October 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefor.

Tjosvold disputed Hagerman's right to the stock option at the time the prospectus was prepared and published. Nonetheless, he accepted the advice of counsel concerning the need to be conservative in public offering documentation and to disclose the disputed "possible" obligation of Yukon under the technology agreement. Yukon's inclusion of the above-referenced language in the prospectus was urged by Yukon's attorney for reasons he explained in his affidavit as follows:

> 2. Your affiant, and the other parties involved in the preparation of the prospectus, were advised of the existence of the written option agreement between Yukon and Mr. Hagerman in the course of their work with Yukon in the fall of 1984 and the winter of 1985. Sometime shortly before February 14, 1985, Mr. David Tjosvold, President of Yukon, informed all interested parties that he and Yukon disputed the validity of the Agreement as a result of certain conversations he had had with Mr. Hagerman.
>
> 3. It was the considered opinion of the parties involved in the preparation of the prospectus for Yukon that it would be safest to adopt a 'worst case' position in disclosing the existence of the Agreement in the final prospectus which, from the standpoint of Yukon, was a liability document. This was done due to the potentially serious adverse consequences should a more optimistic analysis be presented in the prospectus which later proved unwarranted. Accordingly, the final prospectus was written as if no dispute existed over Yukon's obligations under the Agreement with Mr. Hagerman, even though your affiant had been informed of the conversations between Mr. Tjosvold and Mr. Hagerman during which Mr. Hagerman was said to have revoked the 'stock option' provision therein.

Contrary to Hagerman's oral agreement with Tjosvold, Hagerman failed to place or purchase any of the registered stock publicly offered by Yukon and the offering was reduced from $5,000,000 to $2,500,000. Additionally, even though the prospectus indicated that 164,021 shares of Yukon common stock would be issued upon receipt of payment, Hagerman never tendered payment to Yukon or demanded his shares. Instead, after several months Hagerman commenced this action.

B. The Decisions Below

Hagerman's motion for summary judgment relies largely upon the statements made in Yukon's prospectus. Hagerman provided no affidavit and, since he had not yet been deposed in the action, he has never denied under oath the testimony of Tjosvold. The District Court, nevertheless, determined that Yukon was estopped from arguing that the original agreement between the parties had been breached or terminated. The lower court found, in essence, that Yukon's statements in the prospectus constituted "judicial admissions" that the agreement was not modified or terminated. The court did not consider whether Hagerman was estopped from pursuing his claim against Yukon by virtue of Hagerman's breach of his promise to place $2,000,000 of the public offering.

On the issue of damages, the District Court found, as a matter of law, that the shares were to be registered; that Yukon's breach occurred on March 28, 1985 when the public offering was made; and that on that date the fair market value of the stock was $2.00 per share and the book value was $.23 per share.

The Court of Appeals affirmed the lower court decision, though on a different basis. It ruled that while Yukon's statements in the prospectus were not judicial admissions, the conduct of the parties subsequent to the tender of Yukon's checks to Hagerman precluded Yukon's defenses as a matter of law. The Eighth Circuit also found that there were no genuine issues of material fact with respect to the questions whether shares to be provided to Hagerman were to be registered or unregistered, the market value of the shares, the book value of the shares or the date of the breach.

REASONS FOR GRANTING THE WRIT

I. The summary judgment standard applied by the Eighth Circuit conflicts with this Court's decision in *Anderson v. Liberty Lobby, Inc.* The Eighth Circuit weighed evidence and drew inferences in favor of the party seeking summary judgment.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this

Court ruled that a dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party". *Id.* at 248. According to the Court, it is not the judge's function "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial". *Id.* at 249. A judge "must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-moving party] plaintiff on the evidence presented". *Id.* at 252. As noted by the Supreme Court:

> Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor.

Id. at 255.

While the Eighth Circuit acknowledged the language of this standard, its decision-making process did not follow it. Instead, it followed a contrary standard by which evidence is weighed and inferences in favor of the non-moving party are disregarded.

The Eighth Circuit's conclusion can only be understood as being based on the misconception that *Matsushita, Celotex* and *Anderson* represent a radical departure from prior law and authorize the judge to assume a much more active role in "deciding" the facts without a jury trial. The Eighth Circuit gave no recognition to the differences that exist when summary judgment is sought by a plaintiff, when discovery is not even completed. The following discussion illustrates through examples the inappropriateness of the Eighth Circuit's analysis.

A. Liability Issues

1. Termination of Stock Option

Yukon contended that Hagerman's stock option was terminated by virtue of an accord and satisfaction or oral modification of the original agreement. Yukon provided the court with the following uncontroverted evidence:

1. Hagerman assured Tjosvold prior to execution of the written agreement that the written agreement did not make any difference, that "if it isn't right, we will make it right". Hagerman informed Tjosvold that the agreement could and would be changed in the event it was deemed to be unfair or one sided by Tjosvold in the future.

2. Tjosvold testified that during July and October of 1984 Hagerman informed Tjosvold that he wanted to end the agreement and get his money back.

3. Although not required by the agreement, Yukon repurchased the technology at Hagerman's request. When Tjosvold delivered checks to Hagerman in the amounts of $175,000 and $18,000, he informed Hagerman that "I understand that this ends our agreement, here is your money like you wanted, like you requested before. I suppose that's it." Hagerman thereafter accepted the checks and cashed them.

4. Tjosvold informed his attorney, who prepared Yukon's public offering prospectus that he disputed the validity or existence of the agreement between Hagerman and Yukon at that point, and that it was his view that Hagerman had revoked the 'stock option' provision therein.

5. Hagerman never tendered a check to Yukon for shares in issue and Yukon never issued shares to Hagerman. Hagerman failed to fund any portion of the public stock offering.

This evidence provided the lower court with genuine issues of material fact with respect to the issue of whether the agreement was terminated prior to Hagerman's exercise of the stock option. Hagerman did not refute Tjosvold's testimony on these matters. The Eighth Circuit disregarded Tjosvold's testimony and found that evidence of the conduct of the parties subsequent to Yukon's delivery of the checks to Hagerman could only support a finding that the parties did not mutually agree to terminate the stock option. The Eighth Circuit noted that the only evidence of the parties' conduct following the alleged accord and satisfaction was Hagerman's attempt to exercise the option and Yukon's preparation of the stock prospectus in which Yukon unequivocally affirmed the validity of Hagerman's stock option. According to the Eighth Circuit:

> Such conduct belies Tjosvold's assertion of a mutual agreement. Yukon presents no other evidence of conduct on its own part or by Hagerman which indicates that the parties reached a mutual agreement to terminate the written stock option. For example, Yukon presents no evidence that when Hagerman gave written notice of his intent to exercise a stock option, Yukon gave written response that it no longer considered that option to be in effect. You will find that Yukon failed to create a genuine issue of material fact as to whether there was an oral modification or an accord and satisfaction.

(App. A-7)

In other words, the Eighth Circuit weighed the evidence of subsequent conduct against Tjosvold's direct evidence of the termination of the agreement and found the subsequent conduct to be controlling as a matter of law. Further, in weighing the evidence of subsequent conduct of the parties, the court drew as inferences from that conduct only those favoring Hagerman, the moving party.

As to Yukon's subsequent conduct, the prospectus statement, the lower court was provided with an affidavit from Yukon's securities attorney that explained why the prospectus statement did not disprove Tjosvold's testimony that Hagerman's stock option was terminated. A reasonable jury could believe that the prospectus statements were simply an overly conservative disclosure of risk to prevent claims from investors.

As to Hagerman's subsequent conduct, it was equivocal at best. While Hagerman did purport to exercise the option, he never tendered payment for the shares to Yukon. Hagerman's failure to tender payment supports the inference that he knew the option no longer existed.

While the Eighth Circuit found evidentiary significance in Yukon's failure to object to Hagerman's exercise of the option, it ignored the countervailing significance of Hagerman's silence. There was no evidence that Hagerman ever demanded issuance of the shares during the 10 month period between his option notice and the commencement of this action. Hagerman's silence for 10 months supports the inference that Hagerman knew that he was overreaching and that the option no longer existed. Similarly, it can be inferred that Yukon's silence in the face of Hagerman's purported exercise of the option was nothing more than a determination to not dignify Hagerman's obvious overreaching. Since Hagerman was the moving party, the court was required to make these inferences, favoring Yukon. If it had done so, genuine issues of material fact would clearly exist.

2. Estoppel Due to Hagerman's Prior Breach

The uncontroverted testimony of Mr. Tjosvold was that, in order to induce Yukon to provide Hagerman with the stock option, Hagerman promised to fund Yukon's offering to the extent of $2,000,000. It is uncontested that Hagerman failed to fund any portion of the public stock offering. Hagerman's breach consequently excused Yukon from honoring the stock option. In addition, the agreement certainly was unfair since, on the basis of the present judgment, Hagerman will receive a return of $483,000 on an 11 month "loan" of $150,000. Hagerman should be estopped from enforcing the option on the basis of his own breach of promise. *See Wormsbecker v. Donovan Construction Co.,* 76 N.W.2d 643 (Minn. 1956) and *Albacathen v. Bradley,* 3 N.W.2d 783, 785 (Minn. 1942).

In rendering its decision on this defense, the Eighth Circuit again failed to draw reasonable inferences in Yukon's favor. The Eighth Circuit determined that the weight of the evidence contained in the prospectus statement, coupled with an absence of evidence that Yukon later approached Hagerman about

funding for the public offering, mandated that summary judgment be entered.

The inference to be drawn from this subsequent conduct, however, was controverted by Mr. Tjosvold's uncontested testimony. If the Eighth Circuit had drawn all reasonable inferences in Yukon's favor, it would have noted that it was not necessary for Yukon to approach Hagerman in order to trigger Hagerman's contractual obligations. Hagerman had the prospectus and knew about the offering. The fact that he did not purchase or place shares supports the inference that Hagerman knew his agreement with Yukon was terminated.

B. Damage Issues

The issue of damages had three elements - the date of the breach, the market value of the shares on the date of the breach and the book value of the shares on the date of the breach.

1. The Date of the Breach

The Eighth Circuit concluded that Yukon failed to raise an actual question as to the date of the breach since the agreement between Hagerman and Tjosvold provided "that Hagerman's option was valid only in the event of a public offering of Yukon stock". (App. A-12) Since the public offering occurred on March 28, 1985, the Eighth Circuit concluded that that was the date of the breach as a matter of law. The Eighth Circuit again drew inferences favoring the moving party rather than Yukon. The written agreement between Yukon and Hagerman provides as follows:

> This option must be exercised, if at all, in writing and prior to the commencement of any such public stock offering. If the public stock offering fails or is abandoned, then YUKON shall promptly notify HAGERMAN in writing. Within 30 days of such notice to HAGERMAN, HAGERMAN shall sell and YUKON shall buy back all of such shares at the same price.

A reasonable jury could infer that the option had to be exercised prior to the commencement of a public stock offering.

Consequently, if the stock option had been enforceable, Yukon would have had an immediate obligation to tender the shares when it received Hagerman's notice exercising the option on October 23, 1984. Thus, Yukon consistently argued that if any breach occurred, it occurred on that date and the shares should be valued as of that date as unregistered shares (at approximately $.50 a share). If a jury accepts Yukon's argument, Hagerman's damages would be decreased by $246,031.50.

2. Market Value

The Eighth Circuit also acted as a finder of fact in determining that Hagerman was to receive registered shares as a part of the public offering on March 28, 1985 and that the market value of those shares was appropriately calculated at $2.00 per share. The evidence offered by Yukon and the parties' "course of conduct" upon which the Eighth Circuit relied in determining liability, directly contradicts a finding that the shares were to be registered.

The written contract between Hagerman and Yukon makes no provision for the issuance of registered shares. Instead, it required that the option be exercised prior to the commencement of any public stock offering and it contained no "piggy-back" rights for Hagerman to have his shares later registered.

The prospectus and registration statements prepared by Yukon do not support the conclusion that Hagerman's shares were to be registered. If Hagerman's shares were to be registered, the prospectus would have included a heading captioned "Selling Security Holders". It did not. In fact, the registration statement contains an item entitled "Selling Security Holders" which is marked "Not Applicable". There is no provision in the registration statement for the registration of Hagerman's shares.

It should also be noted that Hagerman's October 23, 1984 correspondence purporting to exercise the option suggested using book value as of September 30, 1984, a date well before any of Yukon shares could have been registered and sold. Hagerman's letter goes on to indicate that "as soon as the number of shares and the price per share is provided to the undersigned, immediate payment will be made". This correspondence constitutes compelling evidence that Hagerman

understood that he was to receive unregistered shares issued prior to the public offering.

The Eighth Circuit stated that the only evidence before the lower court was the fair market value of registered shares. That statement is incorrect. Yukon had argued that the shares should be valued as of October 23, 1984, several months before the public offering, and had supplied the affidavit of an expert witness, Randall R. Heiner, which supported the valuation of the shares as of October, 1984, as unregistered shares.

The Eighth Circuit also ignored the factual dispute between the parties with respect to the effect a sale of Hagerman's shares would have had on the market value of those shares. Whether the market would have absorbed Hagerman's 164,021 shares at the public offering price of $2.00 per share is speculative at best and cannot be resolved by summary judgment. Any attempt to sell Hagerman's block of shares would have required a substantial market discount. As shown by an affidavit submitted by Hagerman's counsel, the daily volume of trading in Yukon stock during 1985 could not have accommodated 164,000 shares. The highest daily volume was 43,500 shares and most days the volume was well below 10,000 shares. Obviously, Hagerman could not have sold his shares on one day or even within several days without substantially depressing the market. This fact was acknowledged by Hagerman's counsel on oral argument to the district court:

> The practical problem here, I think, is if Hagerman has 164,000 shares of Yukon and starts to sell them, it's going to rapidly decrease the price in that stock. The last time we looked at the trades on this, which was last week, there were only 900 trades on April 9.

Since the Eighth Circuit ruled that the appropriate measure of recovery to compensate Hagerman for Yukon's breach would be to place Hagerman in the same position he would have occupied absent the breach, the Eighth Circuit's affirmance of a $2.00 per share market value is in error, since it provides Hagerman with a windfall. Again, the Eighth Circuit drew inferences in favor of the moving party.

3. Book Value

Finally, the Eighth Circuit affirmed the lower court's determination that the off-setting book value to be applied to market value of the stock in issue was $.23 per share, the book value prior to the public offering. Thus, Hagerman was given the double windfall of having his obligation fixed on the basis of the pre-offering book value, but Yukon's obligation fixed on the basis of the post-offering market price. Yukon presented the lower court with evidence that the influx of funds generated by the offering increased book value to approximately $.65 per share.

CONCLUSION

The Eighth Circuit opinion imposes a substantial burden on a defendant, in response to a motion for summary judgment, to disprove the plaintiff's claim by something more than direct testimony. The court inappropriately tilted the scales of justice in favor of the plaintiff, disregarded the defendant's testimony and denied the defendant's right to a jury trial. Certiorari should be granted to clarify this critical area of civil trial practice.

Dated: May 18, 1988

Respectfully submitted,

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